DISCRIMINATION LAW

Equality in the Private Sector

2000-2001

Volume 1

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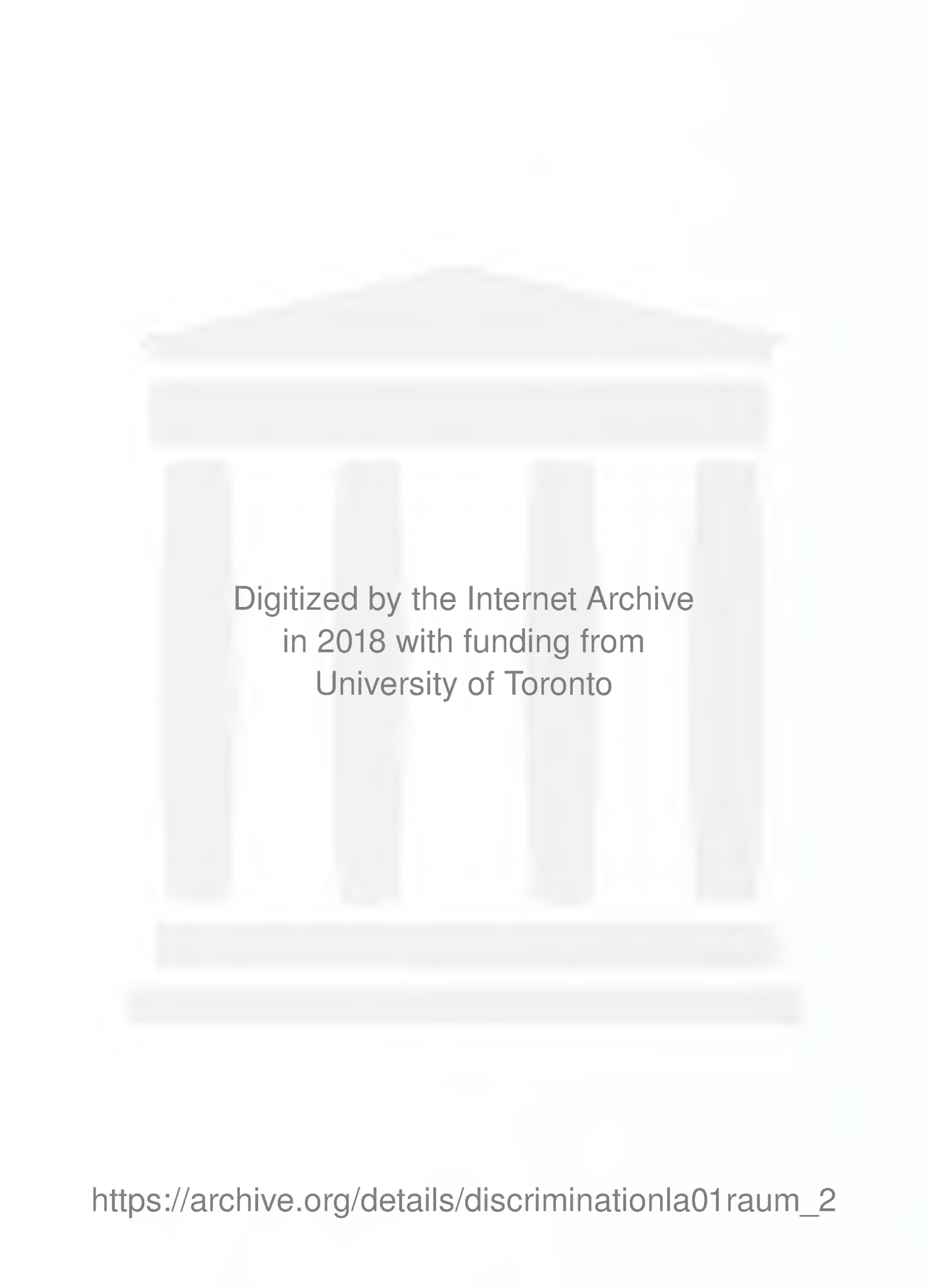

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4. OF PIGEONHOLES AND PRINCIPLES

NOTE: It is useful to think of a discrimination complaint as being structured around three conceptual pillars. These are:

1. the type of good or opportunity that is denied - or the contexts within which discrimination is prohibited -,
2. the grounds upon which an individual is denied a good or opportunity - or the bases of unlawful discrimination -,
3. and the circumstances that make a denial unlawful - or the fault standard for discrimination.

The next chapter of the materials (Chapter 5) will deal with the fault standard. Legislation with respect to the first two aspects of unlawful discrimination has developed into a quite detailed system of rules about who can't do what to whom in what contexts. In this chapter we look at some examples of efforts to adjudicate the scope of the Code's protection both with respect to contexts within which discrimination is prohibited and the grounds upon which it is prohibited. We start with the prohibited grounds, looking at the debates over whether failure to provide the same employment benefits to same sex couples as heterosexual couples enjoy is discrimination on the basis of family status, over whether the category of disability includes discrimination against someone on the grounds of obesity, and whether discrimination against transgendered persons is sex discrimination. We will conclude by looking at recent developments in the area of the right to equal treatment in the provision of good, services, and facilities.

The point of this section is not to come away with all the latest law on who and what contexts are covered by the Code. Rather, as you read these cases, you should think about both how the scope of the legislation has been defined by the statute and how the courts have gone about interpreting those legislated parameters. Why do you think the legislature chose the categories it did? Could it have defined the categories differently? If you were a legislative draftsperson, how would you suggest defining them?

5. DEFINING THE WRONG: FROM INTENTION TO ADVERSE EFFECT

NOTE: The antidiscrimination provisions of the Ontario Human Rights Code effectively created a new cause of action. Central to such an undertaking is a substantive account of the nature of the wrong - the interest to be protected and the kind of behaviour that counts as wrongful. Yet, as Judith Keene points out (*Human Rights in Ontario*, 2nd edn., Toronto: Carswell, 1992, p. 5), the Ontario Code does not define "equal treatment without discrimination", the cornerstone concept of discrimination law. This has left it up to adjudicators - Boards of Inquiry and judges - to fashion an account of what makes behaviour discriminatory and therefore unlawful.

Part of the debate has centred around whether "intent" is required to establish discrimination or whether it can be defined in terms of effects. This chapter of the materials is designed to cast this debate as an effort to define the wrong of discrimination, to determine what grounds the entitlement to protection and what constitutes unlawful behaviour. An important part of this debate hinges on understanding what is meant by "intent" in this context, in contrast to an effect-based account. As you read these materials, ask yourself what each author (whether academic or judicial) means by "intent to discriminate". What does this reveal about the implicit understanding of the human interest being protected by the prohibition of discrimination. How would we have to understand that interest in order to make sense of an effects-based definition of discrimination.

In tort terms, this issue is traditionally referred to as the "standard of fault" issue, and it may be profitably directly to compare the various standards of fault debated in tort law with the implicit understanding in discrimination law as to what makes discrimination unlawful. To refresh your memory about this debate in the tort context, you may wish to **re-read the excerpts from Holmes, *The Common Law*, and Fleming, *The Law of Torts*, reproduced in E. Weinrib, *Tort Law: Cases and Materials*, Toronto: Emond Montgomery, 1997, pp. 51-55, and 63-68.**